Supreme Court, U.S.
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No. 92-1553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JAMES G. MESSER,

Petitioner,

v.

CITY OF DOUGLASVILLE, GEORGIA,

Respondent.

Petition For Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Plaintiff/Petitioner James G. Messer ("Messer") is the owner of property located at 6508 Broad Street in the City of Douglasville, Georgia. In 1988, Jimbo Displays, Inc. leased a portion of the property from the Petitioner to construct a billboard on the premises.

On December 6, 1988, the Defendant/ Respondent, City of Douglasville, Georgia (the "city") issued a sign permit to the applicant, Jimbo Displays, Inc., for an off-premise sign, commonly referred to as a billboard, located at 6508 East Broad Street in the City of Douglasville. This permit was issued to Jimbo for the construction of the billboard at a specific location on the Broad Street property. Jimbo and Holland erected the sign thirty feet away from the site initially approved by Respondent. This new placement of the sign was done without consulting the city, and without filing an application for an additional sign permit. Placing the sign in a

location other than that for which the permit was approved was in violation of the permit and the ordinance.

The expiration date for construction of the sign was August 13, 1989, in accordance with the permit. No sign was ever constructed on the location for which the permit was issued, and in accordance with the expiration date, the sign permit expired on August 13, 1989. Contrary to Petitioner's Statement of Facts, the city did not revoke the sign permit. Petitioner let it expire when he failed to construct a sign at the authorized location.

The property where the sign was located is in the Douglasville, Georgia historic district. On April 17, 1989, the city enacted a new sign ordinance and pursuant to Section 2628(7), off-premise signs are not permitted in the Douglasville, Georgia historic district. Again, contrary to Petitioner's Statement of Facts, the record does not

establish that the Historic District includes most of the business district.

Subsequent to enacting the new sign ordinance provisions, the Respondent became aware of the existence of the Petitioner's unpermitted sign. The city advised Jimbo and Holland that the sign was not permitted, and due to the newly enacted ordinance provisions, the sign could not be constructed at the new location. Additionally, Jimbo was advised by the Department of Transportation for the State of Georgia that since the sign was located at a site other than the one originally requested, a state permit would have to be cancelled and reissued.

Jimbo and Holland, as the owners of the sign, received a hearing before the Board of Adjustments and Appeals requesting a reversal of the city's decision that the new sign was not permitted. After the hearing, the Board of Adjustments and Appeals upheld the decision of the building official. Jimbo and Holland

were advised of this decision on April 6, 1990.

Two months later with full knowledge of the city's decision, on July 10, 1990, Adams Outdoor Advertising, Inc. (Adams) entered into a lease with the Petitioner. The lease provided that the Petitioner is to receive lease payments for allowing Adams to maintain a sign structure on his premises. The lease is contingent on the Petitioner prevailing in this civil action. The Petitioner wants to recover damages for this lease.

On July 12, 1990, Messer, Holland Outdoor Displays, Inc., Jimbo Displays, Inc., and Adams Outdoor Advertising of Atlanta, Inc. filed the present civil action. All of the Plaintiffs except Petitioner subsequently reached an agreement with the city and dismissed their claims with prejudice.

Respondent concurs with Petitioner's recitation of the History of Proceedings.

RESPONSE TO REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT IS IN ACCORD WITH THIS COURT AND OTHER CIRCUITS IN CONCLUDING THAT THE DOUGLASVILLE SIGN ORDINANCE PROVISION THAT DISTINGUISHES ON-PREMISE SIGNS AND OFF-PREMISE SIGNS DOES NOT IMPERMISSIBLY DISTINGUISH BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

As part of its local ordinances, the City of Douglasville, Georgia has established an historic district. Within this district all off-premise advertising signs, commonly referred to as billboards, are prohibited, regardless of their content. On-premise advertising signs are permitted within the district, regardless of their content. In enacting the ordinance, the city has acted only to assert its legitimate government interest in reasonably regulating the non-communicative aspects of advertising signs.

Although written and oral communication is protected by the First Amendment, the guarantee does not extend the right to

communicate at all times and places, and in any manner. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501-503, 101 S. Ct. 2882 (1981). Although billboards are a form of communication, their large size, stationary and permanent nature, and the fact that they stand out from their surroundings, create problems for land use planning and development. Id., at 503. "As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium...." Id.

The Petitioner relies on Metromedia, supra. for authority to support his contention that the Douglasville ordinance violates the his First Amendment rights. While Metromedia establishes the rules of law, that case is very different from this one in that the ordinance in Metromedia regulated the content of messages and favored commercial speech while the Douglasville ordinance does not.

Regulation or restriction of speech is

permitted provided: 1) it is justified without reference to the content of the speech, 2) it is narrowly tailored to serve a substantial governmental interest, and 3) it leaves open, ample alternative channels for communication of information. Id. at 516. Respondent will address the first requirement because that is the only item challenged by the Petitioner. Petitioner concedes that regulating off-premise signs is narrowly tailored to serve a substantial governmental interest, and that the Douglasville ordinance leaves open ample alternative channels for communication of information. He contends only that the ordinance is not content neutral.

Douglasville's sign ordinance does not violate the First Amendment because the distinction between on-premise signs and off-premise signs is content neutral. The ordinance in this case, Section 26-28(7) of the Sign Control Zoning and Subdivision Regulations for the City of Douglasville,

Georgia prohibits off-premise signs within that portion of the city designated as the historic district; however, on-premise signs are permitted. Thus the ordinance only prohibits a particular type of sign, off-premise signs, within a certain section of the city.

Section 26-4 of the ordinance defines an off-premise advertising sign as: "A sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located." An on-premise sign is defined as: "A sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located."

These definitions contain the same language, except that an off-premise sign directs attention to that which is not located on the property where the sign is, while the

on-premise sign directs attention to that which is located on the property. More importantly, neither definition restricts the message that may be placed on the sign. The ordinance simply provides at Section 26-8(7) that an off-premise sign is not permitted in an historic district and an on-premise sign is.

The Petitioner contends that the distinction between off-premise and on-premise advertising signs favors commercial speech over non-commercial speech because off-premise signs allow both commercial and non-commercial speech while on-premise signs permit only commercial speech. Such an interpretation is simply incorrect. In support of his interpretation, the Petitioner relies on the case of Metromedia, Inc. v. City of San Diego, supra. In Metromedia, at 493 (fn. 1), San Diego banned all off-premise outdoor advertising signs within the city limits. The ordinance provided an exception for on-premise

signs and for certain signs falling within twelve specific categories. Id., at 494. The ordinance in Metromedia, at 494, narrowly defined an on-premise sign as referring to the name of the owner or occupant of the premises, or identifying the premises, "or signs advertising goods manufactured or products or services rendered on the premises upon which such signs are placed."

The Court, in a plurality decision, held that the ordinance provision violated the Appellant's First Amendment right because commercial speech was given favorable treatment over non-commercial speech. Id., at 514. The Court reasoned that an off-premise billboard permitted either commercial or non-commercial speech, while an on-premise sign, limited the content to commercial speech. Id. As a result, on-premise signs carrying only commercial messages were permitted, while off-premise signs carrying either commercial or non-commercial messages were banned. Id., at

514-516.

The ordinance in Metromedia, supra, is very different from Douglasville's. The San Diego ordinance limited the definition of on-premise signs to those referring to the owner of the premises or the product or service provided on the premises, thereby restricting the content to a commercial message. Unlike Metromedia, Douglasville does not restrict the on-premise sign to the product or service. The Douglasville ordinance permits any message, whether commercial or non-commercial, as long as it relates to the activity carried out on the premises.

For this reason, the Eleventh Circuit correctly concluded in the present case that Metromedia, did not directly address the distinction between on-premise and off-premise signs when, as in this case, both types of signs permit commercial and non-commercial messages.

Recognizing that the local ordinance in

Metromedia, is distinguished from the present case, the Eleventh Circuit used the rules of law outlined in Metromedia, but not the result. The Eleventh Circuit correctly began its analysis of Douglasville's on-premise and off-premise signs by examining the language to determine whether the regulation is content neutral: "We must first decide whether such an ordinance seeks to regulate speech according to its content." Id.

The Court in the present case concluded that the Douglasville ordinance was content neutral because the regulation is based on the location of signs rather than the content:

> We find that the City of Douglasville's sign ordinance prohibiting off-premise billboards is similarly viewpoint neutral. It regulates signs not based on the viewpoint of the speaker, but based on the location of the signs. There is no claim of bias, censorship or preference regarding a speaker's point of view. The ordinance does not favor commercial over non-commercial speech; neither does it favor non-commercial over commercial speech. Contrary to Messer's argument, there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with

> noncommercial speech. A noncommercial enterprise would be able to put up a sign bearing a noncommercial message as long as it relates to any activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a noncommercial message which related to any activity on the premises.

Id.

In support of its holding, the Court relied on Wheeler v. Commissioner of Highways of Kentucky, 822 F.2d 586, cert. den'd 484 U.S. 1007, rehearing den'd, 485 U.S. 944 (6th Cir. 1987), because the ordinance was nearly the same as Douglasville's. In Wheeler, at 587, Kentucky enacted a law prohibiting the erection of all advertising signs located within a certain distance of an interstate or primary highway. The law exempted signs "advertising activities conducted on the property upon which they are located. ..." Wheeler, at 587 (fn. 1)(emphasis added).

The Wheeler Court in distinguishing the Metromedia case reasoned: "Unlike the restriction at issue in Metromedia, the on-

premises exception in the present case is not limited to commercial speech: the on-premise exception can be applied to any topic, commercial or non-commercial." Wheeler, at 593. The Court concluded "[T]he restrictions permit any non-commercial signs as long as they relate to an activity on the premises." Id.

In upholding the Kentucky statute, the Wheeler Court ruled:

> In the present case, the billboard act and regulations permit on-premises signs relating to an activity conducted on the site which the sign is located. Messages such as 'Abortion is Murder', 'Save the Whales', or 'George Wallace for President' are permitted in non-urban areas and areas not zoned industrial or commercial before September 21, 1959 as long as an activity relating to the message is being conducted on the premises. Non-commercial and commercial speech are treated alike.

Id., at 594. See Also, Rzadkowolski v. City of Lake Orion, 845 F. 2d 653 (6th Cir. 1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F. 2d 172 (4th Cir. 1988); Major Media of the Southeast, Inc., v. City of

Raleigh, 792 F.2d 1269, cert. den'd, 479 U.S. 1102 (4th Cir. 1986); National Advertising Co. v. Chicago, 788 F. Supp. 994 (N.D. Ill. 1991).

In was not lost on the Eleventh Circuit or the Sixth Circuit that the governing authority is not regulating a message. Instead, the ordinance has been carefully drafted to regulate the placement of signs while at the same time recognizing the right of the owner to call attention to the activities on his own property:

> [T]he on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property.

Messer v. City of Douglasville, Georgia, 975 F.2d 1505 (11th Cir. 1992) at 1510 (quoting Wheeler, at 591) (emphasis supplied).

Because Douglasville's ordinance is content neutral, the Eleventh Circuit decision in this case is consistent with the law in affirming the trial court's grant of summary judgment in favor of Respondent.

II. RESPONDENT'S ORDINANCE WHICH PERMITS CERTAIN TYPES OF SIGNS WITHOUT A PERMIT FEE DOES NOT VIOLATE THE FIRST AMENDMENT AS IT DOES NOT FAVOR COMMERCIAL MESSAGES OVER NONCOMMERCIAL MESSAGES, AND IT DOES NOT PROHIBIT ANY MESSAGE.

The purpose of Section 26-17 is to exempt certain types of signs from the requirements either of obtaining a permit or from paying a permit fee. This section of the ordinance does not add any restrictions, and it does not limit, alter, or distinguish these signs.

Section 26-17 lists five types of signs for which a permit fee is not required which are exceptions to the general provisions of the ordinance. Subsection 1 of section 26-17 does not require a fee for a sign on the wall of a building which announces the entity which occupies the premises. Subsection 2 does not

require a permit or a fee if the sign announces that property is for sale or for lease. Subsection 3 does not require a permit or a permit fee for a bulletin board. Subsection 4 does not require a permit or fee if a sign announces a project and names only the architect, engineer, contractor, or financial institution. Subsection 5 does not require a permit for a sign which only directs the movement of traffic on a parcel of property. These exceptions may apply to either commercial or non-commercial speech, and not only to noncommercial messages as Petitioner has incorrectly asserted.

The only regulation in this section of the ordinance is that drawings or diagrams identifying the location of the sign shall be submitted to the building official. The Eleventh Circuit was correct in holding that requiring a permit for certain signs in Douglasville is very different from an outright ban on certain signs as occurred in

Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 453 U.S. 502 (1981). Messer, at 1512, 1513. Some signs require permits and some do not, but they are not prohibited. The Petitioner did not ever challenge the permit process.

The Eleventh Circuit held that these are exemptions, not restrictions. This section of the ordinance does not add any restrictions, and it does not limit, alter, or distinguish these signs. Accordingly, the Eleventh Circuit correctly held that there was no constitutional violation.

III. SECTION 26-18 OF RESPONDENT'S ORDINANCE WHICH REQUIRES A BOND FOR CERTAIN TEMPORARY PERMITS IS A REASONABLE REGULATION AND DOES NOT VIOLATE EITHER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OR THE FIRST AMENDMENT.

Section 26-18 requires that temporary instructional signs, temporary political signs, and temporary signs which are directed towards a specific place, event, political candidate or political issue may be placed

along a street, only after the purchase of a bond in the amount of $500.00 to assure prompt removal.

Petitioner argues that this section is unconstitutional because it is allegedly a limitation on political speech, and that the ordinance is not narrowly tailored to serve a substantial government interest. The purpose of this section of the ordinance which requires the posting of a bond for temporary signs is to insure the removal of signs. Petitioner argues that the same goal could be achieved by the use of a fine after a violation, rather than the "chilling" effect of the requirement of a bond before the ordinance has been violated. Such an alternative, however, will not meet the objective of assuring the prompt removal of these signs. Moreover, Petitioner would have this Court believe that politicians are the only parties "burdened" by this measure, which is not the case.

As this section of the ordinance is directed towards candidates, issues, and events, or anything of a temporary nature, the only way to insure removal of the signs is to require a bond prior to the posting of any signs. There simply is no ability to enforce a violation after the sign is posted because when the event or issue is complete, everyone is gone. The only enforcement mechanism in these instances is requiring that a bond be posted immediately because once the organization departs or the event is over, the city would have no recourse if it were to adopt Petitioner's suggestion of trying to punish those who violate the measure after the event is over and the participants have left.

Petitioner incorrectly contends that the ordinance favors political speech over commercial messages. Section 26-18(a) pertains to signs placed along streets in which the public is directed to a specific place, event, political candidate or political

issue. While the ordinance provisions certainly include political candidates and political issues, it pertains to instances in which temporary signs relating to specific events, whether political or non-political in nature, are placed along the roadways. This ordinance is constitutional precisely because it does not favor commercial verses non-commercial or political verses non-political messages.

The cases cited by the Petitioner are inapposite to the issues in this case. For example, Petitioner identifies Verrilli v. City of Concord, 548 F. 2d 262 (9th Cir. 1977) modified on other grounds 557 F. 2d 664 (9th Cir. 1977). In that case, however, the ordinance expressly singled out only temporary political signs and candidates. Id. at 264 (fn. 1,2). The Douglasville ordinance is addressed to temporary signs. Petitioner also identifies Baldwin v. Redwood City, 540 F. 2d 1360 (9th Cir. 1976). That case set up a

cumbersome regulatory scheme which included a permit application for each sign showing detailed and irrelevant information, in addition to a permit fee of $1.00 per sign and $5.00 deposit for each sign. Id. at 1366 (fn. 14), 1371. The Douglasville ordinance requires only one bond be posted.

Finally, the Petitioner cites Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286 (1972). In that case, a law specifically allowed picketers within a certain distance of public schools only if it involved a labor dispute. Mosley, 408 U.S. at 95, 92 S. Ct. at 2290. The law was stricken because it distinguished between the non-commercial message with no justification. Mosley, 408 U.S. at 95-102, 92 S. Ct. at 2290-2294.

Petitioner asserts that there is no evidence supporting the city's aesthetic interest in insuring the prompt removal of political (or other temporary signs).

However, such evidence is in the record as this Court only need refer to the ordinance itself which provides that aesthetics was among the goals and reasons for the adoption of the ordinance in question was as follows:

> ...to insure compatibility of signs with surrounding land uses, to enhance the business and economy of the city,...to maintain the tranquil environment of residential areas, to promote industry and commerce, to provide an aesthetically appealing environment...and to eliminate visual clutter and blight...

The Eleventh Circuit was correct in finding that no constitutional infirmity existed in this section of the ordinance. Messer, at 1513. The Petitioner's argument rests primarily upon the claim that there are other less intrusive means of assuring removal of political and special event signs after the occurrence of an event. Consistent with the law, the Court found that in the First Amendment analysis "so long as the means chosen are not substantially broader than necessary to achieve the government's

interest; however, the regulation will not be invalid simply because a Court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward v. Rock Against Racism, 491 U.S. 781, 800, 109 S. Ct. 2746, 2758 (1989).

In the present case, the regulation is designed to insure removal of temporary signs, and no particular message is restricted. For the reasons stated above, the regulation is narrowly drawn to achieve its goal and, accordingly, there has been no violation of the First Amendment or Equal Protection Clause.

IV. PETITIONER LACKS STANDING EXCEPT AS TO THE PROHIBITION AGAINST OFF-PREMISE SIGNS BECAUSE HE ADMITS ON THE RECORD THAT HE CARES NOTHING ABOUT OTHER SIGN ORDINANCE ISSUES.

In the lower court, Respondent asserted that Petitioner lacked standing to challenge the permit process of the ordinance, the temporary permit provisions, or the portable

display provisions of the ordinance in question. The district court stated in its Order dated June 26, 1991, that Respondent had standing to challenge these additional provisions of the Douglasville ordinance; however, the court requested that Respondent file a supplemental brief. R2-26-5. Respondent filed a supplemental brief, but the court never issued a ruling. R2-27-5.

Petitioner lacks standing because has not suffered an injury necessary in bringing a cause of action. Respondent relies in part on the case cited in the lower court's Order, Virginia v. American Booksellers Ass'n., Inc., 484 U.S. 383, 108 S. Ct. 636 (1988).

Standing requires "at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action...'" American Booksellers, 484 U.S. 383, ___, 108 S. Ct. 636, 642 (1988) (cit. omitted) (quoting Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct.

2197, 2205 (1975)). If an injury in fact is demonstrated, the party may generally assert only a violation of its own constitutional rights. The trial court in the present case properly noted that in the First Amendment context, an exception exists which permits a Plaintiff to raise a First Amendment constitutional challenge based on a judicial prediction or assumption that the statute may cause others to refrain from constitutionally protected speech or expression. Id. (See also Court's order, page 5). However, this does not excuse a Plaintiff from demonstrating an injury in fact which has resulted from the existence of a statute. While the Petitioner in this case may be entitled to assert the First Amendment rights of others, he has no standing because the evidence is clear that he suffered no injury in fact from the ordinance provisions which are at issue.

At issue in American Booksellers, 108 S. Ct. 636, 639, was a Virginia statute which

made it unlawful to knowingly display for commercial purposes explicit sexual material which might be seen or perused by juveniles. Plaintiffs booksellers challenged the constitutionality of the statute on First Amendment grounds even though there had not been an attempt at enforcement. American Booksellers, 108 S. Ct. 636, 642.

Although the Court in American Booksellers, 108 S. Ct. 636, 642, determined that the Plaintiffs suffered an injury in fact, it was because the statute was aimed directly at the Plaintiffs and because the Plaintiffs demonstrated that they would "have to take significant and costly compliance measures or risk criminal prosecution." Witnesses testified that Plaintiffs would have to (1) create an adults-only section of the store; (2) placed covered works behind the counter; (3) decline to carry the materials in question; or (4) bar juveniles from the store. American Booksellers, 108 S. Ct. 636, 641.

In contrast, the Petitioner in this case made no attempt whatsoever to demonstrate an injury in fact from the temporary sign permit bonding requirement or an of the exemptions to a permit. To the contrary, the Petitioner admitted that his only interest is in the billboard provisions. He has utterly no interest in temporary signs, sign exemptions, or anything other than leasing his billboard.

The Petitioner wants only to obtain enforce a lease to form Plaintiff sign companies for an off-premise sign on his property, which is located in the historic district, a lease which was not entered into until the sign companies were denied a permit for the property and was specifically for this litigation. Exhibit - Messer Deposition p. 19, 20, 32. Thereafter the lawsuit was filed.

The only recovery that the Petitioner is interested in, is the value of the lease with Adams Outdoor Advertising concerning the off-premise sign. Exhibit - Messer Deposition p.

43. Petitioner testified that he is seeking in excess of $29,000.00 which he believes is the market value of the lease with Adams. When asked if he has been damaged in any other way, his response was, "No". Exhibit - Messer Deposition p. 43.

More specific to the remaining ordinance provisions at issue, Petitioner expressly has no interest and does not care about any particular commercial or non-commercial signs. Exhibit - Messer Deposition p. 44. Petitioner has never made an application for a temporary sign or a portable sign and did not even believe that those were an issue in this case. Exhibit - Messer Deposition p. 48.

It is clear from the evidence presented that the only injury which the Petitioner can properly allege that he has suffered is based on an inability to enforce the provisions of the billboard lease against Adams. That alleged injury does not arise from Section 26-18 allowing temporary permits for

instructional and political signs, and it does not arise from Section 26-17 which allows a permit without a fee for certain types of signs.

The fact that an Petitioner may raise a First Amendment challenge based on the judicial exception referenced by the Court does not excuse him from proving an injury in fact based on the existence of the particular ordinance provision. His abstract allegations do not create the necessary injury. American Booksellers, 108 S. Ct. 636, 640 (fn. 3, referring to the rationale for the district court's dismissal of two of the Plaintiffs). See also, Int'l Caucus of Labor Committees v. Chicago, 816 F. 2d 337 (7th Cir. 1987). For these reason the Petitioner lacks standing.

CONCLUSION

Respondent City of Douglasville, Georgia respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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